

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5383 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

SHRISHBHAI DAHYABHAI PATEL

Versus

UPENDRABHAI JETHABHAI THROUGH POA BABUBHAI

Appearance:

MRS KETTY A MEHTA for Petitioner
MR S TRIPATHY for Respondent No. 1
MR GIRISH M PARIKH for Respondent No. 2
NOTICE SERVED for Respondent No. 3

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 23/07/98

ORAL JUDGEMENT

Heard ld. counsel Mrs. K.T.Mehta for the petitioner, ld.counsel Mr. S.Tripathi for respondent no.1 and ld. counsel Mr. G.M. Parikh for respondent no.2.

Rule. Ld. counsel Mr. S. Trpathi waives service of rule for respondent no. 1 and ld. counsel Mr.

G.M.Parikh waives service of rule for respondent no.2. Ld. counsel Mrs. Mehta states that she does not seek any relief against respondent no.3 and requested to permit her to delete respondent no.3 and submitted that she will amend the petition accordingly. Permission is granted. Respondent no.3 is deleted.

At the request of ld. counsel appearing for the respective parties, this matter is taken up for final hearing today.

Ld. counsel appearing for the respective parties have taken this court through details and background of the case. However, the question before this Court is very limited and upon a query, ld. counsel appearing for the respondents fairly conceded to the position that in view of the provisions of sub-rule (1) & (3) of O.23 of the C.P.Code, ld. concerned Judge ought to have accepted the application tendered by the petitioners and the same ought to have been decided on merits after hearing the parties.

On this issue, ld. counsel Mrs. Mehta has relied upon a decision in the case of Banvarilal v/s Smt. Chando Devi (through L.R.) and another, reported in AIR 1993 SC 1139, wherein the Apex Court analysed the contingencies where the party approaches the Court to get the decree set aside by the Civil Court in which a compromise has been arrived at. Relevant observations are in para-7 which reads as under :-

"7. By adding the proviso along with an explanation the purpose and the object of the amending Act appears to be to compel the party challenging the compromise to question the same before the Court which had recorded the compromise in question. This Court was enjoined to decide the controversy whether the parties have arrived at an adjustment in a lawful manner. The explanation made it clear that an agreement or a compromise which is void or voidable under the Indian Contract Act shall not be deemed to be lawful within the meaning of the said Rule. Having introduced the proviso along with the explanation in Rule 3 in order to avoid multiplicity of suit and prolonged litigation, a specific bar was prescribed by R.3A in respect of institution of a separate suit for setting aside a decree on basis of compromise saying :-

"3A. Bar to suit- No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful."

As per amended Rule 3A of O.23 of C.P.Code, it

creates embargo against a party and this barring provision had led the present petitioner to approach the same Civil Judge to agitate the grievance that a fraudulent or otherwise voidable compromise has been entered into by the power of attorney holder. It is not in dispute that at one point of time, respondent no.2 was acting as a power of attorney of the present petitioner. It is observed by the Appex Court that earlier under O.43 R.1(m), an appeal was maintainable against an order under R.3 of O.23 recording or refusing to record an agreement, compromise or satisfaction. The Appex Court, in the aforesaid judgment, further observed as under :-

" Being conscious that the right of appeal against the order recording a compromise or refusing to record a compromise was being taken away, a new Rule 1A has been added to O.43 which is as follows:-

"1A Right to challenge non-appealable orders in appeal against decrees--

(1) Where any order is made under this Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.

(2) In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not, have been recorded."

The Appex Court, in para-14 further observed and held as under :-

"If the agreement or the compromise itself is fraudulent, then it shall be deemed to be void within the meaning of the explanation to the proviso to r.3 and as such not lawful. The learned Subordinate Judge was perfectly justified in entertaining the application filed on behalf of the appellant and considering the question as to whether there had been a lawful agreement or compromise on the basis of which the Court could have recorded such agreement or compromise...."

In the instant case, it is amply established by the present petitioner that after alleged compromise, he had rushed to the very Court and had applied under the relevant provisions of R.3 of O.23 and the ld. Judge has not even cared to accept that application. It is averred in the petition specifically that the application which was presented before the ld. Judge was not entertained properly and small cryptic order was passed stating that as the suit is disposed of, there is no question of taking this application on record. Copy of this order and the application is produced at Annex.E to the petition. Annex.D also shows that request to grant certified copy of the application presented to the ld. Judge was also not granted. Ld. Judge, at the time of deciding the application for grant of certified copy has observed that as this application is not exhibited, certified copy thereof cannot be supplied.

The above facts clearly indicates that the ld. Judge has failed to accept and entertain application tendered before him under R.3 of O.23 of C.P. Code and, therefore, in view of the decision of the Appex Court referred to above, this matter requires to be disposed of by giving appropriate directions to the ld.concerned Judge to accept and entertain the application, if tendered, afresh and dispose of the same on merits and in accordance with law.

Ld. counsel appearing for the parties have fairly agreed that all concerned parties should maintain status quo so far as the suit property is concerned.

In the result, ld. Civil Judge (S.D) Bharuch presiding officer of the Court wherein Special Civil Suit No. 132/94 was pending on the day of the alleged compromise or his successor in office is directed to accept and entertain the application, if tendered by the petitioner, under R.3 of O.23 of C.P.Code, and decide the same on merits and in accordance with law. In the alternative, concerned Ld. Civil Judge should revive the application tendered before him on 4th July 1998 and dispose of the same afresh, on merits and in accordance with law. It is further directed that till the said application is finally disposed of, parties shall maintain status quo qua the suit property. Rule is made absolute. No order as to costs.

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